

UNITED STATES COURT OF APPEALS

SEP 06 2006

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

DIOGENES JAIMES SANCHEZ; et al.,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-70271

Agency Nos. A75-767-058
A75-767-059

ORDER

Before: FERNANDEZ, RYMER, and CLIFTON, Circuit Judges.

The memorandum disposition filed July 28, 2006 is amended as follows:

1. Insert “*See Khourassany*, 208 F.3d at 1101; *but see Moran v. Ashcroft*, 395 F.3d 1089 (9th Cir. 2005) (suggesting, in dicta, that waiver would be available).” after the sentence ending at page 2, line 11 (“ . . . neither Jaimes-Sanchez nor Pena-Garcia meets the criteria for eligibility.”).

2. Replace the sentence beginning on page 2, line 12 and ending on page 2, line 14 (“Given this disposition . . .”) with:

In any event, the IJ ruled that Jaimes-Sanchez and Pena-Garcia could not establish that their removal “would result in exceptional and extremely unusual hardship” to a qualifying family member. 8 U.S.C. § 1229b(b)(1). Their due process challenge fails, as the IJ did not err in excluding evidence and testimony whose relevance was not apparent at the time of the hearing, and the IJ’s conduct at the hearing did not rise to the level of a constitutional

violation. *Cf. Reyes-Melendez*, 342 F.3d at 1006-07 (noticeably aggressive IJ, who “offered a stream of non-judicious and snide commentary” and rendered an order “replete with sarcastic commentary and moral attacks,” violated petitioner’s due process right to impartial adjudication); *Cano-Merida v. INS*, 311 F.3d 960, 964-65 (9th Cir. 2002) (IJ’s off-the-record comments to alien petitioner prior to the presentation of oral testimony or documentary evidence that he had no viable asylum claim, along with prejudicial evidentiary rulings during hearing, denied petitioner his due process right to impartial adjudication); *Colemenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (IJ who stated at the outset of hearing that he had “no idea what the basis for the [asylum] claim is,” and who “behaved not as a neutral fact-finder interested in hearing the petitioner’s evidence, but as a partisan adjudicator seeking to intimidate [petitioner] and his counsel,” was not impartial). Accordingly, the IJ’s hardship ruling provides an independent and adequate ground for denial of cancellation of removal.

With the above amendments, the panel has voted to deny the petition for rehearing and the request for a stay of removal.

The petition for rehearing is DENIED and the request for stay of removal is DENIED.